

# EXHIBIT 49

FILED UNDER SEAL

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

<b>POWER INVESTMENTS, LLC,</b>	)	
	)	
<b>Plaintiff/Counterclaim Defendant,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 4:21-cv-01022-SEP</b>
	)	
<b>CARDINALS PREFERRED, LLC,</b>	)	
	)	
<b>Defendant/Counterclaim Plaintiff.</b>	)	

**DECLARATION OF MASON L. MILLER**

I, the undersigned, Mason L. Miller, pursuant to 28 U.S.C. §1746, declare as follows:

1. I am over 18 years of age and have personal knowledge of the facts contained in this declaration, and I am of sound mind and competent to testify as a witness to those facts.
2. I submit this Declaration in connection with Plaintiff Power Investments, LLC's Motion for Summary Judgment.

**The Parties & Ashley Energy**

3. I am a member and manager of Power Investments, LLC ("Power"). Power's business has been to purchase and own an interest in the Company, Ashley Energy, LLC, that owns the Ashley power plant.
4. I am also a member of the Board of Managers of Ashley Energy, LLC ("Ashley Energy" or "Ashley").
5. I have been Ashley's CEO for approximately five years. I was appointed Ashley's Chief Executive Officer, President, and Secretary in 2017 pursuant to Section 6.4(a) of Ashley's August 9, 2017 Operating Agreement (the "Agreement") (Ex. 1).

6. Ashley's members are Power and Cardinals Preferred, LLC ("Cardinals").

7. Arena Investors, LP ("Arena") is a New York-based hedge fund that controls Cardinals.

8. It is my understanding, based on my dealings with Arena, that Arena created Cardinals to accomplish its partial ownership and management of the Ashley Power Plant.

9. Ashley's Board of Managers consists of myself, David Disque and Victor Dupont. Mr. Disque and Mr. Dupont are employees of Arena, and they act as Cardinals' representatives on the Board.

**Negotiations Related to the Operating Agreement**

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

### Power's Call Exercise

17. On August 9, 2021, Power gave Cardinals notice that it had exercised its call option pursuant to § 10.5(b) of the Agreement.

18. Power's call notice also set forth a purchase price calculated under § 10.5. This figure was approximately \$1.6 million, an amount equal to Cardinals' initial investment in Ashley

plus 12%. The notice used this number because it was higher than the figure that would have been obtained using the formula in § 10.5 that was based on Ashley's EBITDA, which was negative at the time.

19. Power's call notice also included a calculation under § 10.5's EBITDA-based formula, which incorporated an EBITDA determination by Ashley's auditors (Brown, Smith Wallace LLP) as of July 31, 2021 and other elements required by the formula. This formula produced a negative number.

**Ashley's Engagement of BSW to Determine EBITDA and as Ashley's Auditors**

21. From 2017 to August 2021, I operated Ashley's business as President and CEO. I regularly reported to the other Board members (Mr. Dupont and Mr. Disque) and kept the Board informed with detailed Board presentations of Ashley's activities. I also maintained and sent for approval detailed minutes of what was discussed at Board meetings. I have continued to do all of these things in my role as Ashley's President and CEO and as an Ashley Board member.

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### **Distributions of Alleged “Excess Capital”**

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**Exhibits Submitted in Support of Motion for Summary Judgment<sup>1</sup>**

35. Attached hereto as **Exhibit 1** is a true and correct copy of the Amended and Restated Limited Liability Company Agreement of Ashley Energy LLC, dated August 9, 2017.

36. Attached hereto as **Exhibit 2** is a true and correct copy of a letter, dated August 9, 2021, from Mason Miller to Lawrence Cutler.

37. Attached hereto as **Exhibit 3** is a true and correct copy of a letter, dated August 15, 2021, from Lawrence Cutler to Mason Miller.

38. Attached hereto as **Exhibit 4** is a true and correct copy of a letter, dated August 15, 2021, from Lawrence Cutler to Ashley Energy LLC.

39. Contemporaneously being filed under seal as **Exhibit 5** is a true and correct copy of an Arena Investors, LP Investment Memorandum, dated August 9, 2017, and a cover email from Jeffrey Ferris dated April 12, 2021 (produced by Cardinals in discovery).

40. Contemporaneously being filed under seal as **Exhibit 6** is a true and correct copy of an email chain, dated February 9, 2017, among David Disque, Victor Dupont, and Daniel Zwirn (produced by Cardinals in discovery).

41. Attached hereto as **Exhibit 7** is a true and correct copy of an email, dated February 6, 2017, between Victor Dupont, Mason Miller, and David Disque.

42. Attached hereto as **Exhibit 8** is a true and correct copy of an email chain, dated February 10, 2017, among Victor Dupont, Mason Miller, and David Disque.

43. Contemporaneously being filed under seal as **Exhibit 9** is a true and correct copy of an email chain, dated February 11, 2017, among Victor Dupont, Mason Miller, and David Disque (produced by Cardinals in discovery).

44. Attached hereto as **Exhibit 10** is a true and correct copy of an email chain, dated August 7, 2017, among Charles Gelinas, Victor Dupont, Mason Miller, and David Disque.



45. Contemporaneously being filed under seal as **Exhibit 11** is a true and correct copy of the April 26, 2022 deposition transcript of David Disque.

46. Contemporaneously being filed under seal as **Exhibit 12** is a true and correct copy of an email chain, dated August 12, 2021, among Jeffrey Ferris, Antoinette Walker, John Felletter, Elvin Anchipolovsky, Andrew Feng, David Disque, and Victor Dupont (produced by Cardinals in discovery).

47. Contemporaneously being filed under seal as **Exhibit 13** is a true and correct copy of the April 27, 2022 deposition transcript of Jeffrey Ferris.

48. Contemporaneously being filed under seal as **Exhibit 14** is a true and correct copy of an email chain, dated August 12, 2021, among Antoinette Walker, Jeffrey Ferris, John Felletter, Elvin Anchipolovsky, Andrew Feng, David Disque, and Victor Dupont (produced by Cardinals in discovery).

49. Contemporaneously being filed under seal as **Exhibit 15** is a true and correct copy of the April 28, 2022 deposition transcript of Victor Dupont.

50. Contemporaneously being filed under seal as **Exhibit 16** is a true and correct copy of an email chain, dated August 12, 2021, among Jeffrey Ferris and Andrew Feng (produced by Cardinals in discovery).

51. Contemporaneously being filed under seal as **Exhibit 17** is a true and correct copy of an email chain, dated August 13, 2021, among Victor Dupont, Jeffrey Ferris, David Disque, Andrew Feng, and Daniel Blanks (produced by Cardinals in discovery).

52. Contemporaneously being filed under seal as **Exhibit 18** is a true and correct copy of an email chain, dated August 13, 2021, among Victor Dupont, David Disque, Jeffrey Ferris, Andrew Feng, Daniel Blanks, and Elvin Anchipolovsky (produced by Cardinals in discovery).

53. Attached hereto as **Exhibit 19** is a true and correct copy of a Form 8-K dated July 26, 2019, for Biorestorative Therapies, Inc.

54. Attached hereto as **Exhibit 20** is a true and correct copy of a Form 8-K dated December 17, 2021, for Charge Enterprises, Inc.

55. Contemporaneously being filed under seal as **Exhibit 21** is a true and correct copy of Ashley Energy Board meeting minutes dated August 31, 2020.

56. Contemporaneously being filed under seal as **Exhibit 22** is a true and correct copy of a letter dated October 19, 2020, from Bryan Graiff to Mason Miller, with attachment (produced by Armanino in discovery).

57. Contemporaneously being filed under seal as **Exhibit 23** is a true and correct copy of an email chain, dated October 5, 2020, among John Schwartz and Dan Schoenleber (produced by Armanino in discovery).

58. Contemporaneously being filed under seal as **Exhibit 24** is a true and correct copy of Ashley Energy Board meeting minutes dated January 14, 2021.

59. Contemporaneously being filed under seal as **Exhibit 25** is a true and correct copy of Ashley Energy LLC's Unaudited Profit and Loss data comparison for March 2020 and March 2021 (produced by Cardinals in discovery).

60. Contemporaneously being filed under seal as **Exhibit 26** is a true and correct copy of an email chain, dated May 19, 2021, among Jeffrey Ferris, Antoinette Walker, Elvin Anchipolovsky, John Felletter, David Disque, and Victor Dupont (produced by Cardinals in discovery).

61. Contemporaneously being filed under seal as **Exhibit 27** is a true and correct copy of Ashley Energy Board meeting minutes dated June 1, 2021.

62. Contemporaneously being filed under seal as **Exhibit 28** is a true and correct copy of an email, dated August 5, 2021, between Antoinette Walker, Andrew Feng, Elvin Anchipolovsky, Mason Miller, Jeffrey Ferris, David Disque, and Victor Dupont (produced by Cardinals in discovery).

63. Contemporaneously being filed under seal as **Exhibit 29** is a true and correct copy of email, dated August 10, 2020, between Gary Tod, Mason Miller and Bartley Rose.

64. Contemporaneously being filed under seal as **Exhibit 30** is a true and correct copy of an excerpt from the April 25, 2022 deposition transcript of Curtis Taylor.

65. Contemporaneously being filed under seal as **Exhibit 31** is a true and correct copy of a spreadsheet created by Brown, Smith & Wallace LLP (produced by Armanino in discovery).

66. Contemporaneously being filed under seal as **Exhibit 32** is a true and correct copy of an excerpt from the June 15, 2022 deposition transcript of Robert Rhee.

67. Attached hereto as **Exhibit 33** is a true and correct copy of an email chain, dated August 13, 2021, among Jeffrey Ferris, Mason Miller and Edgar Gall.

68. Contemporaneously being filed under seal as **Exhibit 34** is a true and correct copy of an email chain, dated January 13, 2021, among Daniel Zwirn, David Disque, Andrew Feng, Jeffrey Ferris and Mason Miller.

69. Contemporaneously being filed under seal as **Exhibit 35** is a true and correct copy of an email chain, dated December 1, 2020, among Mason Miller, Jeffrey Ferris, and Edgar Gall (produced by Cardinals in discovery).

70. Contemporaneously being filed under seal as **Exhibit 36** is a true and correct copy of an email chain, dated December 1, 2020, among Jeffrey Ferris, Mason Miller, and Edgar Gall (produced by Cardinals in discovery).

71. Contemporaneously being filed under seal as **Exhibit 37** is a true and correct copy of an excerpt from an excel spreadsheet prepared by Brown, Smith & Wallace LLP (reformatted from the excel and with “Q&E” and a Bates number stamped at the bottom by counsel).

72. Contemporaneously being filed under seal as **Exhibit 38** is a true and correct copy of a handwritten Ashley Board minutes.

73. Contemporaneously being filed under seal as **Exhibit 39** a true and correct copy of an excerpt from an excel spreadsheet prepared by Brown, Smith & Wallace LLP (reformatted from the excel and with “Q&E,” a Bates number and a page number stamped at the bottom by counsel).

74. Contemporaneously being filed under seal as **Exhibit 40** is a true and correct copy of an email chain, dated March 15, 2021, among Mason Miller, Daniel Zwirn, Victor Dupont, David Disque, Andrew Fox, Andrew Feng, Jeffrey Ferris, and Edgar Gall (produced by Cardinals in discovery).

75. Contemporaneously being filed under seal as **Exhibit 41** is a true and correct copy of an email chain, dated May 19, 2021, among Jeffrey Ferris, Lawrence Cutler, Ana Sofia Llan Tamayo, Paul Sealy, Ron Petrosky, John Felletter, Patrick Vance, Crystal Love, Daniel Zwirn, Alicia Ferraro, Vincent DeVito, Larry Fox, Jim Kehoe, Antoinette Walker, Elvin Anchipolovsky, Mace Liberman, Eamonn McInerney, and the Arena Asset Management Team (produced by Cardinals in discovery).

76. Contemporaneously being filed under seal as **Exhibit 42** is a true and correct copy of a presentation prepared by KPMG, dated March 31, 2020 (produced by Cardinals in discovery).

77. Contemporaneously being filed under seal as **Exhibit 43** is a true and correct copy of an email chain, dated May 13, 2021, among Xin Yuki, the Arena Asset Management Team, Van Hettinga, Thomas D’Arminio, Nanki Singh, Virginia Sangster, and Ana Sofia Llano Tamayo,

J (produced by Cardinals in discovery).

78. Contemporaneously being filed under seal as **Exhibit 44** is a true and correct copy of an email chain, dated May 29, 2019, among Jeffrey Ferris and Charles Soutar (produced by Cardinals in discovery).

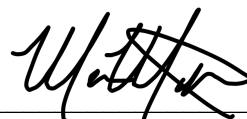
79. Contemporaneously being filed under seal as **Exhibit 45** is a true and correct copy of an email chain, dated February 14, 2021, among Mason Miller, Daniel Zwirn, Jeffrey Ferris, Andrew Fox, Andrew Feng, David Disque, and Victor Dupont (produced by Cardinals in discovery).

80. Contemporaneously being filed under seal as **Exhibit 46** is a true and correct copy of an email chain, dated June 24, 2021, among Edgar Gall, Jeffrey Ferris and Mason Miller (produced by Cardinals in discovery).

81. Contemporaneously being filed under seal as **Exhibit 47** is a true and correct copy of an email chain, dated August 5, 2021, among Edgar Gall, Jeffrey Ferris, and Mason Miller (produced by Cardinals in discovery).

82. Contemporaneously being filed under seal as **Exhibit 48** is a true and correct copy of an email chain, dated August 6, 2021, among Curtis Taylor, Mason Miller, Edgar Gall, and Dan Schoenleber (produced by Armanino in discovery).

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 7th day of July, 2022



Mason L. Miller